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IN THE

Supreme Court of the United States

October Term, 1930.

No. [redacted] 17

ALBERT A. HOEPER,

Appellant,

v.

TAX COMMISSION OF WISCONSIN, and
MARATHON COUNTY, WISCONSIN,

Respondents.

BRIEF FOR APPELLANT.

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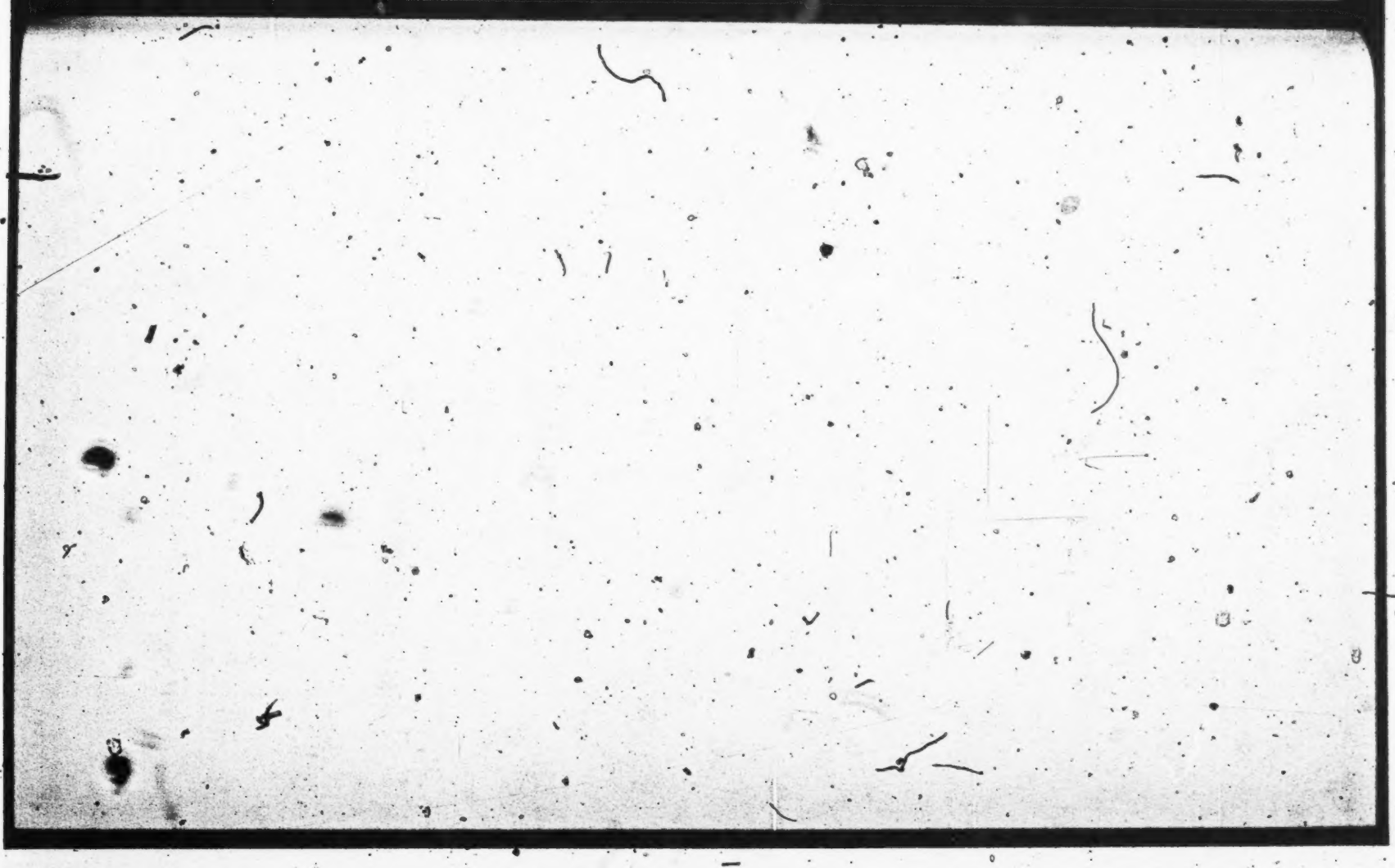

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 714

ALBERT A. HOEPER,

Appellant,

v.

TAX COMMISSION OF WISCONSIN, and MARATHON COUNTY, WISCONSIN,

Respondents.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Supreme Court of Wisconsin, which held not in conflict with the Fourteenth Amendment to the Constitution of the United States two certain statutes of Wisconsin, to-wit:

(a) *R. S. 71.05 (2d)* which levies an income tax on appellant because of income received by his wife from her own separate estate.

(b) *R. S. 71.09 (4c)* which taxes appellant on his own income at a higher rate than otherwise because his wife has separate income.

(Statutes quoted at Appendix, this brief, and at page 3 of our Statement of Jurisdiction heretofore filed.)

OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Wisconsin, *202 Wis. 493; 233 N. W. Rep. 100,* held both statutes valid (Transcript pp. 19-24).

The opinion of the Circuit Court held the statutes valid because of the supposed controlling force of the prior decisions of the Wisconsin Supreme Court, but held that, if free to decide independently, he would hold the statutes violated the Federal Constitution (Transcript pp. 11-14).

GROUNDS OF JURISDICTION.

As these are stated in our "Statement of Jurisdiction" heretofore filed, we assume the rule no longer requires separate statement in the brief.

The substance of the claim is that the two statutes referred to deprive appellant of his property without due process of law, and deny him the equal protection of the laws. (See Statement of Jurisdiction pp. 3, 4 and Transcript pp. 24-25.)

STATEMENT OF THE CASE.

Appellant, a widower, and Florence Rowley, a widow, (each being the head of a family and entitled to exemptions as such), married on October 22, 1927. Each had separate earnings and business, the income from both

sources being their respective separate incomes, and the property of neither was received by gift, transfer or otherwise from the other (Transcript p. 16).

Each made separate income returns for the years 1926 and 1927. These showed that in 1927 Mr. Hoeper's income was $7150.00 from salary and $3259.25 from dividends and interest, and Mrs. Hoeper's income in 1927 was $2400.00 from salary, $143.91 from dividends and interest, and $1519.52 from the distribution above salaries of an insurance agency earnings with which Mr. Hoeper had no connection (Transcript pp. 5-6).

The assessor of incomes assessed a tax on appellant of $292.19, being the tax on the total of both incomes, as if both were his own income, and exceeding by about $100.00 the *total tax on both* if assessed to each separately (Transcript p. 11). Appellant was compelled to pay this amount, which he did under protest, and, after complying with all precedent requirements, brings this action to recover the excess payment above the lawful tax on his own income (Transcript pp. 6, 16).

The Circuit Court held that the proper construction of the statutes did not authorize including in Mr. Hoeper's income that of Mrs. Hoeper before she was Mrs. Hoeper, and so allowed a recovery of $77.69; but in deference to our Supreme Court decisions, and contrary to his own view of the law, held the statutes so construed to be valid, and denied recovery of any more (Transcript p. 17). The excess recoverable, if each had been assessed separately, is $133.83 (Transcript p. 17).

So the state collected, and the judgment appealed from allowed it to retain, $56.14, part being tax on Mrs. Hoep-

er's income since the marriage and part because the combined income threw a portion of his income into a higher bracket. The amount involved is small, but is more than John Hampden's 20 shilling ship tax.

ERRORS ASSIGNED.

I. In holding that *R. S. 71.05 (2d)*[1], pursuant to which the state levied and collected from Mr. Hoeper an income tax, based solely on the separate property of Mrs. Hoeper, did not violate the Fourteenth Amendment.

II. In holding that *R. S. 71.09 (4c)*[2], pursuant to which the state levied and collected from Mr. Hoeper a tax on his own income, at a rate greater because his wife has separate property than the rate collected of others whose wives have no separate property, did not violate the Fourteenth Amendment.

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1 and 2. See Appendix.

ARGUMENT.

I. Construction of Statutes.

Whether the two statutes might have been construed as together authorizing only a collection from each spouse of that one's proportionate share of the tax is not involved. The Court held the collection of the entire tax from Mr. Hoeper was a valid exercise of taxing power. So construed, we claim it is void.

Then follows the corollary claim that a statute taxing a husband at a higher rate because his wife also has income is likewise void.

As the arguments applicable to the first statute *(71.05 (2d))* apply in principle to the second *(71.09 (4c))*, we discuss both together.

II. Nature of the Tax

It is solely a tax on the recipient of income.

Whether a tax on property, or an excise tax under the rule of

> *Brushaber v. Union P. Ry. Co., 240 U. S. 1, 14,*
> *Pollock v. Farmers Loan & Trust Co., 158 U. S. 601,*

is not important here because no question of apportionment is involved.

The Fourteenth Amendment forbids a state taking property without due process of law or denial of equal protection of the laws by any means or method whatever.

An excise or privilege tax is subject to the constitutional limitations.

Airway Electric Appliance Co. v. Day, 266 U. S. 71, 83-5,
International Paper Co. v. Mass., 246 U. S. 135, 142.

That this tax is on the recipient of the income on which the tax is based is established by the Wisconsin decisions construing the State Constitution and Income Tax Statutes:

Art. VIII, Sec. 1, Const. of Wis.
State ex rel Wickham v. Nygaard, 159 Wis. 396, 402-3.
State ex rel Manitowoc Gas Co. v. Tax Commission, 161 Wis. 111, 116.
State ex rel Moon v. Tax Commission, 166 Wis. 287, 290.

The *State Constitution* provides (the last sentence being added by an amendment in 1908):

> "The rule of taxation shall be uniform, and taxes shall be levied upon such property with such classifications as to forests and minerals, including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

In *State ex rel Wickham v. Nygaard, 159 Wis. 396, 402-3*, our Court said:

> "This Constitution provided originally that taxes should be levied on property, and the matter of taxing incomes was practiced little, if at all, in America when the Constitution was adopted. • • • We construe the amendment as authorizing the legislature to

tax incomes in any case where the power rests in the state to impose such a tax."

In *State ex rel Manitowoc Gas Co. v. Tax Commission, 161 Wis. 111, 116,* the Court said:

"Our income tax is a burden laid upon the recipient of the income whether derived from real estate, personal property, or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined. It is a toll taken from the fruits of property and labor in proportion to the net value of the harvest. Such toll is property, and so is the fruit of property and labor."

In *State ex rel Moon v. Tax Commission, 166 Wis. 287, 290,* the Court said.

"Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed, not his property—and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and the specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income irrespective of the amount of specific property or ability necessary to produce or create it. In

the ordinary acceptation of the term this may be said to be a tax upon income as the statute denominates it. But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon the recipient of an income."

This Court gives the same definition of an income tax in *Willcuts v. Bunn, 75 L. Ed. 159,* thus:

"The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regardless of use or disposition of the security."

III. In Wisconsin, a Husband Has No Interest In Or Control Over His Wife's Property, Earnings Or Income.

Chapter 246 of the Statutes of Wisconsin, entitled "Property Rights of Married Women", removes every common law right of the husband in property or income of the wife. We quote the following sections:

"*R. S. 246.01. Realty of.* The real estate of every description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were unmarried."

"*246.02. Estate of, not subject to husband.* The real and personal property of any female who may hereafter marry and which she shall own at the time of marriage and the rents, issues and profits thereof shall not be subject to the disposal of her husband nor be liable for his debts and shall continue her sole and separate property."

"*246.03. May receive, hold and convey property.* Any married female may receive by inheritance or by gift, grant, devise or bequest from any person, hold to her sole and separate use, convey and devise real

and personal property and any interest or estate therein of any description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts. Any conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons."

"*246.05. Individual earnings.* The individual earnings of every married woman, except those accruing from labor performed for her husband, or in his employ or payable by him, shall be her separate property and shall not be subject to her husband's control or liable for his debts."

"*246.07. May sue in her own name.* Every married woman may sue in her own name and shall have all the remedies of an unmarried woman in regard to her separate property or business and to recover the earnings secured to her by *sections 246.05* and *246.06*, and shall be liable to be sued in respect to her separate property or business, and judgment may be rendered against her and be enforced against her and her separate property in all respects as if she were unmarried." * * *

R. S. 6.015 (1), (enacted in 1921), also provides:

"*Women to have equal rights.* (1) Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. The various courts, executive and administrative officers shall construe the statutes where the masculine gender is used to include the feminine gender unless such construction will deny to females the special protection and privileges which they now en-

joy for the general welfare. The courts, executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purposes of this statute."

No claim can be or will be made, we believe, that as to her property, earnings or unearned income, a husband has any right whatever, any more than any stranger has. We need not refer to such decisions in detail. Sufficient to quote as an accurate statement of the law of Wisconsin the following from the opinion of Judge A. H. Reid, the learned and revered trial Judge, to-wit:

"We have reached that advanced stage in the legal rights of women when the legal status of women is at least as great as that of men, and in some particulars greater. There is no distinction between a married and an unmarried woman in respect to such legal status. The statute declares that 'Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying (fol. 30) property, care and custody of children, and in all other respects.' *(Sec. 6.015).* Her freedom of contract includes her right to make earnings separate from her husband and completely control them. She may enter into a partnership with her husband *(Sparks v. Kuss, 195 Wis. 378).* She may sue her husband upon any cause of action she possesses, the same as if she were unmarried. *(Wait v. Pierce, 191 Wis. 202.)* She may become a surety. *(Bank v. John, 179 Wis. 117.)* And indeed there is no particular in which a married woman's husband has any right to or control over property or income or cause of action of his wife. She may convey her property without his consent, although he cannot do the same as to his property."

The construction of the state courts will be followed in determining to whom income from community property is assessable.

U. S. v. Robbins, 269 U. S. 315, 326-7.

IV. R. S. 71.05 (2d), Which Authorized Collection of a Tax from Mr. Hoeper Solely Because His Wife Had Separate Income from a Separate Estate, Took His Property "Without Due Process of Law".

(a) Limitations on the power of taxation.

We recognize the great latitude a state has in selecting subjects and persons for taxation. This latitude does not permit taking of property by taxation, unless there be

> "an equivalent rendered to the taxpayer in the protection of his person and property".
>
> *Union Transit Co. v. Kentucky, 199 U. S. 194, 202.*

So in holding void a statute permitting non-taxable Government bonds to be included in the valuation of bank assets in fixing value of its stock for taxation, this Court said:

> "When this* is read the doubt instantly arises whether the law intended to tax the corporation for property which it does not own, but which on the contrary is owned by the stockholders. Certainly such a purpose, against common justice and of doubtful constitutionality, ought not to be attributed to the law if any other fair construction is possible. With respect to taxation usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon the property which they own, not upon property which others own. We should

* Refers to the following language in the statute: "Assessed to said banks, * * * not to the individual stockholders."

be reluctant to suppose that there has been any departure from this principle in this law."

Home Savings Bank v. Des Moines, 205 U. S. 503, 510.

So it is held that a tax imposed upon a resident of the taxing state because of ownership of property in another state is a taking of property without due process of law and void.

Union Transit Co. v. Kentucky, supra.

A. T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 285.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 38.

Pullman Co. v. Kansas, 216 U. S. 56, 62.

State Tax on Foreign Held Bonds, 15 Wall. 300.

The state may consider property beyond its borders, and hence not taxable by it, in fixing the measure of a tax on property within the state.

Maxwell v. Bugbee, 250 U. S. 525.

K. C. M. & B. Ry. Co. v. Stiles, 242 U. S. 111.

But if in so doing it imposes a tax on a valuation beyond the intra-state proportionate share of the total valuation, the tax is without due process of law and void.

Wallace v. Hines, 253 U. S. 66, 69-70.

And the tax is likewise void if, in assessing the intra-state intangibles, the value of extra-state intangibles is included.

Southern Ry. Co. v. Kentucky, 274 U. S. 76.

In holding that membership in a Chamber of Commerce might be taxed by a state, the turning point was:

"It is not to be doubted—giving full effect to all the allegations of the complaint—that the memberships despite the restrictions of the rules were property."

Rogers v. Hennepin County, 240 U. S. 184, 189.

(b) An income tax may be levied only on the owner or legal beneficiary of the income.

Corliss v. Bowers, 281 U. S. 376, assumes such limitation as to income tax. In reply to the claim that since the plaintiff had placed the property in a trust, the income was not taxable to him, the Court, because of his reserved control, said:

"But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. * * * The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

This is followed, in *Poe v. Sanborn, 75 Law Ed. 27,* where it is held that in community states a wife may file a separate return of her income because, as distinguished from the *Corliss case,* "the husband never had ownership" of that income. See also:

U. S. v. Robbins, 269 U. S. 315, 326-7,
Old Colony Trust Co. v. Comm., 279 U. S. 716.

V. No Classification Can Make Appellant Liable for the Tax on This Income of Mrs. Hoeper.

(a) Classification deals with discrimination, not fundamental liabilities.

If propositions III and IV are true, the above conclusion would seem to follow. Classification has to do with questions of discrimination, not of fundamental liability for the subject matter. If the subject matter is taxable to a given person, then the "equal protection of the laws" clause of the Fourteenth Amendment protects him against discrimination by classification. But if the subject matter is not taxable at all to the person in question, then such taxation is the taking of property "without due process of law". In that case we submit that classification cannot validate. A valid tax may be made void by discriminatory classification. A void tax cannot be validated by classification.

Is, then, the reasoning of the Wisconsin Supreme Court that marriage authorizes this tax sound?

(b) Position of Wisconsin Supreme Court Stated.

That Court says:

> "It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may effectively be collected from another, without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification, based on the marriage relation, is wholly arbitrary and unreasonable in connection with the imposition of an income tax. We cannot agree that it is. The marriage relation has always been a matter of great public concern. As was said in *Boehmer v. Kalk, 155 Wis. 156, 160; 144 N. W. 182:*

'The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory, is very great. Consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation, by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of persons and property which both state and federal constitutions were framed to protect.'

"The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax. The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well-recognized social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income. • • •

"It is of course true that there may be some families in which the husband enjoys the benefit solely from his income, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated, has no bearing upon the reasonableness of the classification. • • •

"It will be noticed that both sections under examination here relate to the income of the husband and wife only when living together as husband and wife, and it is at least a permissible inference that the legislature might have had in mind the advantages with respect to the enjoyment of the income, in enacting these sections and providing for a tax based on the aggregate income.

"Taking all of the foregoing circumstances together, we cannot say that the classification is wholly arbitrary and unreasonable, or that it is not germane to the purposes of the tax."

Is this reasoning sound?

(c) The claim of opportunities for fraud and colorable transfers cannot avail to validate this tax.

On the undisputed facts, this income of Mrs. Hoeper was not from any property in which her husband ever had any interest. It was what the law of Wisconsin assures to her, "her own separate earnings and estate".

So the rule of *Schlesinger v. Wisconsin, 270 U. S. 228, 240,* seems to bar any such consideration as a basis for classification. The language of that case seems to fit exactly this claim of the state:

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The State having declared the legal rights to be financial separation, it then taxes on the basis of the old repealed doctrine of financial unity merely as our Court said to avoid "evasion", declared by this Court to be no legal reason. Applying the Schlesinger ruling to the opinion of the Wisconsin Supreme Court leaves this a tax on financial unity where there is no financial unity.

(d) Under the Laws of Wisconsin, marriage affects only the social, and not at all the financial, status of the parties.

By particular and definite declarations of policy and property rights, the State has wiped out every vestige of the old common law unity as to property rights. The union is a social, not a financial unity. Whether this policy of financial independence will tend in time to weaken the social interdependence and unity is a sociological problem which does not concern us here. For weal or woe, financial separation is established as the fundamental policy of the State. That policy as established by our statutes fixes the property rights of Mrs. Hoeper and bars him from any right to or interest in her property or income.

(e) A tax law based on property, which taxes one because of property rights of another with whom he has social but no financial relations, makes an arbitrary and unreasonable classification, having no relation to the subject matter of the tax law, and is void.

As stated under (a), it seems to us no question of classification arises because taxing one for income of another is a taking of property without due process of law. But as we claim the statute also denies appellant the equal protection of the laws, we come to the above point.

That a classification to be valid must be, (a), based on substantial distinctions which make a real difference, (b) consistent with natural justice, (c) reasonable and not arbitrary, (d) germane to the purpose of the law, and (e) not discriminatory within the class, is all elementary and calls for no listing of citations.

> "'In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action."
>
> *Smith v. Cahoon, 75 Law. Ed. 813, 819.*

The classification must be based on something "having relation to the purpose for which it is made".

Airway Elec. App. Corp. v. Day, 266 U. S. 71, 85.
So. Ry. Co. v. Greene, 216 U. S. 400, 417.

The purpose of the Income Tax Law is to raise moneys for the general purposes of government by a tax on the recipient of incomes. Granted that reasonable exemptions and graduated rates are permissible. Here we have a distinction based solely on social relations.

A married man of the same income as Mr. Hoeper is taxed less, if his wife has no property of her own, than is Mr. Hoeper. Yet Mr. Hoeper has no right to or interest in any portion of Mrs. Hoeper's property. He has the same legal duty of support as has the other man. Mrs. Hoeper's income cannot legally be called upon to aid in any of his legal duties.

He is entitled to a child's earnings; hence the child's income may (at least to the extent of its earnings) properly be added to his. Not so as to the wife's income.

A partnership may, no doubt, be taxed to the unity. There is a unity of financial interests. The law makes the

fact of partnership a unity of liability. If, however, a tax statute in taxing a partnership should attempt to impose the total liability on one partner, a different question might arise.

Here is a classification based on facts entirely foreign to the income of the several taxpayers. It does not seem at all germane to a tax law based on the ownership of property or receipt of income.

Whether a state might lawfully tax the privilege of marriage is beside the question here. That is not the purpose or purport of the Income Tax Law. Since contracts in restraint of marriage are void as against public policy, we need not convict the state legislature of any such purpose.

Why say that the "usually contemplated result of the marriage" is a sharing of incomes? We conceive the usually contemplated result is a union pursuant to, and in mutual recognition of, the respective legal rights and obligations annexed to the contract of marriage.

The husband may legally, if this law is valid, be taxed more than his entire income in some cases to pay the levy on his wife's income, while he has no claim to or interest in that income. Is that a reasonable classification? Is it not arbitrarily based on an extraneous fact? If we postulate that she may probably use her income for his benefit, have we not injected a novel and dangerous element into the law of tax classification? May one be lawfully taxed because of a prospect that he may receive a favor, rather than because of his legal rights? If so, then a child may lawfully be taxed, and collection enforced out of its own legal estate, because it has wealthy par-

ents who probably will lavish their wealth on it. Or go one step farther—collateral relatives may show a like disposition toward a child of their fancy. As we heretofore stated (Reply as to Jurisdiction, p. 3), "If such a Pandora's box is opened, who can foretell what will come out?".

Improbable that any such tax will be attempted? Maybe so; but where is the line to be drawn? Only, we say, at legal rights and duties. There is a clear and easily defined line of limitation. Pass beyond that, and no other clear limitation can be found.

We have caused search to be made of statutes of other states and find none like or similar in principle to these Wisconsin statutes. Others usually follow the Federal Statutes which *permit* spouses to make either joint or separate returns and impose no greater liability than the separate returns show, unless the taxpayers elect otherwise.

VI. R. S. 71.05 (2d) Also Denies Appellant the Equal Protection of the Laws.

This is simply a question of classification. We have discussed that question under V and nothing more need be added here.

VII. R. S. 71.09 (4c), Pursuant to Which the State Levied and Collected From Mr. Hoeper a Tax on His Own Income at a Rate Greater Than Collected of Others of Like Income, Also Violates the Fourteenth Amendment.

We see no need of separate discussion under this head. If the State may tax a husband because of separate estate

and income of his wife, it may impose an increased rate on him on his own income for the same reason. If, on the other hand, the Fourteenth Amendment prohibits taxing him on his wife's income, the same reasoning prohibits increasing his own tax for that reason. The excess added to his proper tax is a tax on him solely because of his wife's income. It is a difference in amount or degree only, not a difference in principle.

We submit that the judgment of the Supreme Court of Wisconsin should be reversed.

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APPENDIX.

R. S. 71.05 (2d), Statutes of Wisconsin:

• • • "In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation."

R. S. 71.09 (4c), Statutes of Wisconsin:

"Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in *subsection (2) of section 71.05* shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."